U.S. Department of Justice

DRAFT

90-7-1-21

Washington, D.C. 20530

July 11, 1984

Becky A. Comstock, Esquire
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, Minn. 55402

Re: United States v. Reilly Tar & Chemical Corp., No. 4-80-469 (D.Minn.)

Dear Becky:

My colleagues and I have reviewed Reilly's latest settlement proposal. We appreciate the work that you and your colleagues put into preparing the proposal. However, there appears to be great conceptual differences between Reilly and the United States about what would be a suitable consent decree in this action, as well as differences about the specific provisions of such a decree. Reilly's proposal would essentially substitute the City of St. Louis Park for Reilly as the party responsible for the implementation of a remedial action program and would limit Reilly's liability to specified cash amounts. Reilly's proposal further calls for a hold harmless agreement under which the United States, among others, would hold Reilly harmless for the effectiveness of the remedy. While I can readily appreciate Reilly's interest in this conceptual framework, I think you would understand why such an approach will not be acceptable to the United States.

As you know, the United States in settling CERCLA cases has taken the position that responsible parties must remain obligated to implement a remedy, to maintain that remedy, to make any changes and corrections in that remedy that prove necessary and to respond to any future releases or threatened releases of hazardous substances (both anticipated and unexpected) which may occur, especially releases which may create an imminent and substantial endangerment. The approach which Reilly suggests, limiting Reilly's liablity to specified cash amounts, would not achieve those ends. Reilly must take responsibility for the actual cost of installing and maintaining a remedy, not simply the estimated costs. Reilly must also be responsible for the actual cost of dealing with contingencies and for responding to

new and threatened releases. As we have done in other consent decrees, we are willing to work out a framework to resolve disputes which may occur in implementing the remedy and in dealing with contingencies and new occurrences. But we are not prepared to give Reilly the type of finite resolution which may be customary in resolving a contract dispute.

We understand that the City of St. Louis Park may be willing to participate in implementing the remedy, although the extent to which the City is willing to assume these responsibilities is not clear. While we have no objection to the City performing some of the work and paying some of the cost, we are not prepared to substitute the City for Reilly as the sole party responsible to the United States. As you know, the United States has taken the position that CERCLA imposes joint and several liability, a position which has been upheld by many district courts. We would accept Reilly and the City as jointly and severally liable; Reilly and the City may divide responsibility for the total remedial package between them, but each would be jointly and severally responsible to the United States for the implementation and maintenance of the total remedy, without regard to any agreement between them. This approach is consistant with section 107(e) of CERCLA which prevents a responsible party from transfering his liability to another, even if he receives a hold harmless agreement. Reilly's continued responsibility would be especially necessary in this case since the other party involved is a municipality. The United States has entered into a number of consent decres with municipalities under the Clean Air Act and the Clean Water Act. Unfortunately, we have all too often found that while municipalities may enter into these consent decrees with the best of intentions, changes in local politics or budgetary factors may lead to a situation where a city is unwilling or believes it is unable to comply with the terms of a consent decree.

The United States will not agree to hold Reilly harmless for the implementation and maintenance of a remedial program. Although the remedy we propose will represent our technical judgment as to what is necessary, the United States is not guaranteeing any remedy, nor is it required to under CERCLA. The responsible parties, Reilly and the City if it is so obligated, must maintain the remedy and take additional action if the remedy proves inadequate.

We have also examined the remedial action plan which you submitted. While we have seen significant improvement over Reilly's previous remedial proposals, there are still differences between Reilly and the United States as to what is an acceptable remedial plan. I should also point out that Reilly's offer concerning the United States' past costs is inadequately low.

I do not believe that the draft consent decree which you submitted represents a basis for further negotiation. What I propose to do is submit to you a new draft consent decree and remedial program which reflects the involvement of the City and Reilly's continued liability. Perhaps that will provide a basis for discussion.

Sincerely yours,

Assistant Attorney General
Land and Natural Resources Division

By: David Hird

David Hird, Attorney
Environmental Enforcement Section

cc: Stephen Shakman, Esq.
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